2009

State of Utah v. Charles Moa : Reply Brief

Utah Supreme Court

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
CHARLES MOA,	:	Case No. 20090882-SC
Defendant/Petitioner.	:	Petitioner is incarcerated.

REPLY BRIEF OF PETITIONER
ON CERTIORARI REVIEW

This writ of certiorari arises from a court of appeals' decision affirming two judgments of conviction in the Third Judicial District, in and for Salt Lake County, State of Utah. Case no. 031903971 involves a conviction for one count of Discharging a Firearm Toward a Building, a third degree felony, in violation of Utah Code Ann. § 76-10-508 (2003), the Honorable Timothy R. Hanson, presiding. Case no. 071904352 involves convictions for one count each of Discharging a Firearm From a Vehicle, a third degree felony, in violation of Utah Code Ann. § 76-10-508 (Supp. 2007), Failure to Respond to an Officer's Signal to Stop, a third degree felony, in violation of Utah Code Ann. § 41-6a-210 (2005), and Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (2003), the Honorable Stephen L. Henriod, presiding.

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INTRODUCTION

There is no need for the Court to revisit the court of appeals' conclusion that the invited error doctrine does not apply to Moa's claim that the trial court committed plain error when it accepted his guilty plea in case no. 3971. The State has not identified any statement defense counsel made during the plea proceedings that led the trial court to disregard its personal duty to ensure that the plea was knowing and voluntary. Further, statements defense counsel made after the plea proceedings are irrelevant to the question of invited error. Thus, this Court should reach the merits of Moa's claim. See infra at Part I.

Moreover, there is no need for the Court to revisit the court of appeals' conclusion that the error was obvious. An error is obvious if the law governing the error was clear at the time the error was made. The State concedes that the plea colloquy and affidavit lacked a necessary element of the offense. This concession resolves the obviousness issue because the law requiring the court to inform Moa about the elements of the offense and the factual basis for the plea was clear at the time the court accepted Moa's plea. Besides, the State's

argument that the error was not obvious fails because it relies on irrelevant habeas corpus case law, it misstates the obviousness test, it employs assumptions to bridge the gap in the factual basis, and it misconstrues the scope of Moa's claim. See infra at Part II.

Finally, this Court should hold that the trial court's erroneous acceptance of the guilty plea was prejudicial. This Court's holding in Dean is consistent with Moa's claim of prejudice. Furthermore, this Court should not consider information in the presentence report (PSI) because it is irrelevant and unhelpful to the determination of whether Moa was prejudiced by the trial court's error. See infra at Part III. Thus, for the reasons stated in the opening brief, this Court should reverse because the court of appeals erred by holding that Moa was not harmed when the trial court accepted his guilty plea without informing him about a necessary element of the offense or eliciting a factual basis to satisfy that element. See Pet. Br. at 30-43. Moa does not respond to the State's other arguments, including the arguments regarding case no. 4352, because the arguments are adequately addressed in the opening brief. See Pet. Br. at 13-50.

ARGUMENT

I. THE INVITED ERROR DOCTRINE DOES NOT APPLY TO MOA'S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT DENIED THE MOTION TO WITHDRAW HIS GUILTY PLEA IN CASE NO. 3971

The court of appeals rejected the State's request to apply the invited error doctrine to Moa's claim in case no. 3971 and, instead, addressed the merits of the claim under the plain

error doctrine. See State v. Moa, 2009 UT App 231, ¶¶5-17, 220 P.3d 162. Because the court of appeals' decision was correct, there is no need for the Court to revisit invited error.[1]

The "invited error doctrine arises from the principle that '"a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error."'" State v. Winfield, 2006 UT 4, ¶15, 128 P.3d 1171 (citations omitted). Under the invited error doctrine, the Court will "decline[] to engage in even plain error review when 'counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].'" Id. at ¶14 (citations omitted) (alterations in original). "Affirmative representations that a party has no objection to the proceedings fall within the scope of the invited error doctrine because such representations reassure the trial court and encourage it to proceed without further consideration of the issues." Id. at ¶16 (citation omitted); see, e.g., State v. King, 2006 UT 3, ¶20 & n.2, 131 P.3d 202 (invited error "implicated" where counsel "affirmatively represented to the trial court that he did not have an objection" to the jury panel); State v. Pinder, 2005 UT 15, ¶63, 114 P.3d 551 (error invited where counsel "stipulated to [the affirmative defense] instruction, signaling by an affirmative act that he had no objection"); State v. Geukgeuzian, 2004 UT 16, ¶12, 86 P.3d 742 (error invited where trial court gave instruction like the instruction proposed by

[1] The Court did not include the invited error doctrine in its order granting a writ of certiorari; nor is it necessary for the Court to address the invited error doctrine in order to decide the issues on certiorari. See Order dated Jan. 28, 2010. Therefore, the Court should exercise its discretion not to address the invited error doctrine. See Utah Code Ann. § 78A-3-102(5) (Supp. 2009) ("The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication. . . ."); Utah R. App. P. 46(a) ("Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons."); cf. State v. Topanotes, 2003 UT 30, ¶9, 76 P.3d 1159 (alternative grounds for affirmance must "be apparent on the record" and "sustainable by the factual findings").

defendant, which "affirmatively purported to list all 'essential elements'" of the offense); State v. Hamilton, 2003 UT 22, ¶55, 70 P.3d 111 (error invited where counsel "affirmatively indicat[ed] that [the defense] had no objections to the instructions").

In this case, the trial court's error occurred at the change of plea hearing, when it accepted Moa's guilty plea without first "personally establish[ing]" that Moa understood the elements of the offense and the factual basis for the plea. State v. Hoff, 814 P.2d 1119, 1122 (Utah 1991). As explained in Moa's opening brief and recently reaffirmed by this Court in State v. Lovell, 2010 UT 48, --- P.3d ---, the trial court bore a duty of strict compliance at the change of plea hearing. See Pet. Br. at 16-17; Lovell, 2010 UT 48 at ¶13. When accepting Moa's guilty plea, it could not rely on "assumptions about [Moa's] knowledge." Lovell, 2010 UT 48 at ¶17; see Pet. Br. at 16-27 (additional citations). Rather, it had to establish on the record during the plea proceedings that Moa "'*was unequivocally and clearly informed*'" about the elements of the offense and the factual basis for the plea. Lovell, 2010 UT 48 at ¶¶13, 16 (quoting State v. Smith, 777 P.2d 464, 466 (Utah 1989)) (emphasis omitted); see State v. Corwell, 2005 UT 28, ¶¶11-12, 114 P.3d 569; State v. Thurman, 911 P.2d 371, 372-73 (Utah 1996); State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987); Utah R. Crim. P. 11(e)(4)(A)-(B); Pet. Br. at 16-27.

No affirmative representation made by defense counsel at the change of plea hearing excused the trial court from strictly complying with rule 11(e). See, e.g., Lovell, 2010 UT 48 at ¶26 ("Smith requires . . . that the court find that the defendant was actually aware of the [rule 11(e)] right and that his awareness is clearly evident in the record of the trial proceedings in which the defendant pled guilty." (citing Smith, 777 P.2d at 466)); State v.

Abeyta, 852 P.2d 993, 995 (Utah 1993) ("strict compliance" requires court to "personally establish that the defendant's guilty plea is truly knowing and voluntary" and that he "knowingly waived his . . . constitutional rights and understood the elements of the crime").

To the contrary, the circumstances of the plea should have prompted the trial court to be extra vigilant in discharging its duty of strict compliance. See R. 3971 (226). Not only was the plea affidavit difficult to read, see Pet. Br. at 6 n.4, 25, but it was also incomplete, inaccurate, and confusing. See Pet. Br. at 20-27. For example, it entirely omitted the element that both defined the *mens rea* of the offense and elevated the offense from a class B misdemeanor to a third degree felony with an enhanced penalty, see Pet. Br. at 22-23; its factual basis was incomplete and included elements from unrelated offenses, see Pet. Br. at 24-26; and there were no other documents incorporated into the record that could have supplemented or clarified the affidavit's inadequacies. See Pet. Br. at 24.

Moreover, despite its inadequacy, defense counsel relied on the affidavit as a complete statement of the guilty plea. For example, when asked whether he had explained the deal to Moa, defense counsel said, "Yes, Your Honor," but clarified that he "took over this case after . . . Valdez had already arranged this [plea bargain] and I just reiterated it all and have gone over it with [Moa] and *I believe that this [the plea affidavit] is our understanding of the deal.*" R. 3971 (226:5) (emphasis added); see Moa, 2009 UT App 231 at ¶9. Then, "[w]hen asked for the factual predicate for the charge, defense counsel" relied on the affidavit, stating, "'Judge, *apparently* on or about the 4th of April 2003 Mr. Moa, as a party, intentionally and knowingly discharged a firearm toward a building in Salt Lake

County, State of Utah. *That's what is written down here as the elements and the facts*, Your Honor.'" Moa, 2009 UT App 231 at ¶8 (emphasis added); see R. 3971 (226:6).

In its brief, the State does not identify any action taken by defense counsel during the change of plea hearing that invited the trial court's error. See Rspt. Br. at 14, 18-19. Instead, it relies on statements made at the hearing on the motion to withdraw the guilty plea. See Rspt. Br. at 9-10, 14, 18-20. But statements made by defense counsel after the change of plea hearing are irrelevant because they could not have led the trial court into its error. See Lovell, 2010 UT 48 at ¶36 ("For the purpose of determining whether the trial judge strictly complied with rule 11(e), we may not take into account information that came to light at the hearing on the motion to withdraw the guilty plea but was not known to the judge taking the plea."); Pratt v. Nelson, 2007 UT 41, ¶23, 164 P.3d 366 (holding party did not invite error by filing "untimely responsive memorandum concerning an issue in the case" because "invited error generally occurs in a more affirmative manner").

Nor did defense counsel's statements at the motion hearing create "an evidentiary gap" that would prevent this Court from addressing the issue on the merits. Rspt. Br. at 19-20. All the information the Court needs to decide the issue is contained in the change of plea hearing and the plea affidavit. See, e.g., Lovell, 2010 UT 48 at ¶79 ("'Gibbons requires that at the time a guilty plea is entered the judge should establish on the record that the defendant knowingly waived his or her constitutional rights and understood the elements of the crime.'" (quoting Hoff, 814 P.2d at 1122)); State v. Dean, 2004 UT 63, ¶12, 95 P.3d 276 (appellate court may "consider the facts and circumstances in which the plea was taken," such as "the record of the plea proceedings, including the plea colloquy and plea

affidavit or statement"); State v. Maguire, 830 P.2d 216, 217 (Utah 1991) (per curiam) (strict compliance "may be demonstrated on appeal by reference to the record of the plea proceedings"); Gibbons, 740 P.2d at 1313 ("There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (citation omitted)).

In fact, the issue is one the Court may address even when it was not raised by the parties. "'An appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision.'" Kaiserman Assocs. v. Francis Town, 977 P.2d 462, 464 (Utah 1998) (citations omitted). "[A]n overlooked or abandoned argument should not compel an erroneous result"; neither should an appellate court "be forced to ignore the law just because the parties have not raised or pursued obvious arguments." Id. Thus, in State v. Breckenridge, 688 P.2d 440 (Utah 1983), the Court addressed the plea even though the issue was unpreserved and unaddressed by the parties because the defendant's "right to due process was violated" when the court accepted the plea without establishing the elements or factual basis. See Breckenridge, 688 P.2d at 443.

In sum, to the extent that defense counsel did not investigate the nature and elements of the offense or the factual basis for the plea and, therefore, did not realize that the plea affidavit was incomplete and inaccurate, he provided ineffective assistance of counsel. See Pet. Br. at 29 n. 5. This is grounds for reversal and, if necessary, warrants remand to the court of appeals for consideration. See id. But it is not grounds to excuse the trial court's plain error in accepting a guilty plea that was not knowingly and voluntarily entered as

required by due process, section 77-13-6, and rule 11. Therefore, this Court should address the merits of Moa's claim because defense counsel did not invite the trial court's error.

II. THIS COURT SHOULD NOT REVISIT THE COURT OF APPEALS' CONCLUSION THAT THE TRIAL COURT'S ACCEPTANCE OF THE GUILTY PLEA IN CASE NO. 3971 WAS OBVIOUS ERROR

An error is obvious if "the law governing the error was clear at the time the alleged error was made." Dean, 2004 UT 63 at ¶16 (citations omitted). In its opinion, the court of appeals determined that the trial court's error was obvious because the law governing the error was clear at the time the error was made. See Moa, 2009 UT App 231 at ¶15. It held that the trial court erred because "[t]he full elements of the third-degree felony to which Moa was pleading were not referenced or clarified anywhere in the colloquy or plea statement," and that "the error should have been obvious to both the court and counsel because the statute" listing the elements of the offense "was unambiguous." Id. As explained in the opening brief, this decision was correct. See Pet. Br. at 20-29.

In its response brief, the State concedes the accuracy of the court of appeals' decision: "[T]he plea colloquy and affidavit" were inadequate because they did not state that "[Moa] acted 'with intent to intimidate or harass another or with intent to damage a habitable structure,'" which was a necessary element of the offense. Rspt. Br. at 29 (quoting Utah Code Ann. §76-10-508(2)(b)); see also Rspt. Br. at 7. This concession settles the obviousness issue in favor of the court of appeals: It is a concession that the law governing the error was clear at the time the error was made. See Dean, 2004 UT 63 at ¶16. Regardless, the State urges the Court to revisit obviousness. The Court should reject the

State's argument because it relies on habeas corpus cases that are irrelevant to Moa's direct appeal, it misstates the obviousness test, and it misconstrues the breadth of Moa's claim.

A. The Standard of Review for Habeas Corpus Cases Does Not Apply to Moa's Direct Appeal.

A defendant who attacks his guilty plea collaterally has hurdles to surmount that do not apply to defendants who challenge their plea on direct appeal. See, e.g., State v. Litherland, 2000 UT 76, ¶13, 12 P.3d 92 (defendants in the "habeas arena" face "numerous burdens not present on direct appeal"). For example, on direct appeal, the appellate court will review the change of plea hearing and documents properly incorporated into the record at the time of the plea proceedings. If this review reveals that the trial court failed to strictly comply with rule 11(e), the appellate court will reverse. This standard of review is stated in Gibbons and its progeny. See, e.g., Lovell, 2010 UT 48 at ¶79; Corwell, 2005 UT 28 at ¶11; Thurman, 911 P.2d at 372-73; Gibbons, 740 P.2d at 1312-14.

Whereas, "*in the context of a collateral attack on a conviction*, a rule 11 violation is not, in and of itself, a constitutional violation and therefore does not, standing alone, make a petitioner's claim meritorious." Bluemel v. State, 2007 UT 90, ¶16, 173 P.3d 842 (emphasis added). Thus, the appellate court will not limit its review "to the record of the plea hearing." Salazar v. Warden, 852 P.2d 988, 992 (Utah 1993). Rather, it will "look at the surrounding facts and circumstances, including the information the petitioner received from his or her attorneys before entering the plea." Id. Further, the Court will not reverse if it discovers "a violation of the prophylactic provisions of rule 11." Id. Rather, it will only reverse if the petitioner can show, based on a review of the entire record, "that the guilty

plea was in fact not knowing and voluntary." Id.; see Bluemel, 2007 UT 90 at ¶18. This standard is only applied where defendants attack their guilty pleas collaterally:

> "[W]e are not retreating from our holding in State v. Gibbons, restated in State v. Maguire, that the trial court must strictly comply with rule 11. If this were a direct appeal from denial of a motion to withdraw a guilty plea, for example, failure to strictly comply with the rule would be grounds for reversal."

Salazar, 852 P.2d at 991 n.6 (internal citations omitted); see Lovell, 2010 UT 48 at ¶79; Bluemel, 2007 UT 90 at ¶¶18-19; cf. United States v. Timmreck, 441 U.S. 780, 784 (1979) (in context of collateral attack, federal rule 11 violation was not constitutional violation since respondent raised only "a technical violation of the Rule" and did not claim "he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty").

The State's obviousness argument urges the Court to disregard Gibbons and the other direct appeal cases and, instead, to apply the habeas corpus standard of review to Moa's case. This is improper because Moa's case is on direct appeal. See R. 3971 (205-06). Although lack of preservation requires Moa to show the error was obvious and prejudicial, see Pet. Br. at 9, 27-43, it does not transform his appeal into a collateral attack or subject him to the extreme hurdles that accompany a collateral attack.

The State does not justify its reliance on habeas corpus cases. See Rspt. Br. at 17-41. Nor does it acknowledge this Court's repeated statements that the habeas corpus standard of review does not govern cases on direct appeal. See Rspt. Br. at 17-41. In fact, it relegates its analysis of Lovell, this Court's most recent reaffirmation that Gibbons governs direct appeals, to two short footnotes. See Rspt. Br. at 23 n.8, 35 n.11. These footnotes do not distinguish Lovell or the other direct appeal cases; rather, they summarily dismiss Lovell

because the State "filed a petition for rehearing" on a perceived premise that it deems dicta. See Rspt. Br. at 23 n.8, 35 n.11. Therefore, this Court should reject the State's obviousness argument because it disregards the governing case law and relies instead on an irrelevant standard of review applicable only in habeas corpus cases.

B. The State's Response Brief Misstates the Obviousness Test.

In its brief, the State disregards the traditional obviousness test: An error is obvious if the law governing the error was clear at the time the error was made. See Dean, 2004 UT 63 at ¶16. It also disregards the accepted standard for reviewing a guilty plea on direct appeal: The Court will limit its review to the plea colloquy and the documents properly incorporated into the plea proceedings. See, e.g., Corwell, 2005 UT 28 at ¶¶12, 17; State v. Visser, 2000 UT 88, ¶¶11-13, 22 P.3d 1242; Maguire, 830 P.2d at 217-18.

Instead, it claims that the Court should measure obviousness by the defendant's ability to prove "that he obviously did not know the elements of the crime at issue." Rspt. Br. at 27 (bolding omitted). Further, it argues that the Court, when determining obviousness, should not limit its review "'to the record of the plea hearing,'" but should also "'look at the surrounding facts and circumstances, including the information the petitioner received from his or her attorneys before entering the plea.'" Rspt. Br. at 27 (quoting Salazar, 852 P.2d at 993) (other citations omitted).

In support of its proposed obviousness test, the State cites one direct appeal case: Visser. See Pet. Br. at 27. Visser, however, does not support the State's proposition because it does not discuss the plain error doctrine or the obviousness test at all. See Visser, 2000 UT 88 at ¶¶1-18. Moreover, it applies the direct appeal standard of review espoused

in Gibbons and other direct appeal cases rather than the higher habeas corpus standard favored by the State. See Visser, 2000 UT 88 at ¶11 (holding that strict compliance "means 'that the trial court [must] personally establish that the defendant's guilty plea is truly knowing and voluntary and establish *on the record* that the defendant knowingly waived his or her constitutional rights.'" (citations omitted) (alteration and emphasis in original)).

The remainder of the State's support comes from habeas corpus cases— Salazar and Jolivet v. Cook, 784 P.2d 1148 (Utah 1989). See Rspt. Br. at 27. These cases are irrelevant because they apply a heightened standard of review that is only applicable when a petitioner attacks his guilty plea collaterally. See Salazar, 852 P.2d at 991-92 & n.6 (court considering a petition for habeas corpus "is not limited to the record of the plea hearing"); Jolivet, 784 P.2d at 1150 (reviewing record as a whole to determine that defendant, who challenged his plea post appeal, understood the elements and factual basis of the offense); supra at Part II.A. Besides, even habeas corpus cases do not require a petitioner to show that the involuntariness of his plea was "obvious." Pet. Br. at 27; compare with Salazar, 852 P.2d at 992 (requiring petitioner to show that his plea was "in fact not knowing and voluntary").

In sum, the obviousness test proposed by the State, if adopted, would subject cases on direct appeal to a higher standard of review than even petitions for writs of habeas corpus receive. See Rspt. Br. at 27-32. Thus, this Court should reject the State's claim and, as explained in the opening brief, affirm the court of appeals' traditional obviousness analysis.

C. This Court Should Not Presume Moa's Plea Was Knowing and Voluntary.

Having substituted the "record as a whole" review reserved for habeas corpus cases for the limited review applied in direct appeal cases, the State still cannot identify any

evidence that shows Moa "was unequivocally and clearly informed" about the elements of the offense or the factual basis for the plea. Smith, 777 P.2d at 466. Instead, the State argues that the Court should "presume that the plea was knowing and voluntary." Rspt. Br. at 30-31. As before, the Court should reject the State's claim because it is contrary to direct appeal case law and improperly relies on habeas corpus cases.

When reviewing a collateral attack on a guilty plea, the appellate court "may look at the surrounding facts and circumstances, including the information the petitioner received from his or her attorneys before entering the plea." Salazar, 852 P.2d at 992. Whereas, when a case is on direct appeal and the record is silent or incomplete, the reviewing court will not assume that the plea was knowing and voluntary. See, e.g., Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (stating court will not presume compliance with knowing and voluntary requirement from a silent record); Lovell, 2010 UT 48 at ¶26 (holding plain language of rule 11(e) "requires the plea-taking judge to find that the defendant *knows* of the right, not that there is a reasoned basis to believe that the defendant knows of the right" (emphasis in original)); id. at ¶37 ("The trial court was required to determine that [defendant] was clearly and unequivocally informed that he had the right to a public trial, not merely that it was likely that he knew of the right."); Thurman, 911 P.2d at 375 (where the mental state element was not clear from record, "we can hardly assume that it was clear" to defendant at time he entered plea); Hoff, 814 P.2d at 1123 (stating it is insufficient for a trial court to rely on "defense attorneys and plea affidavits" for plea); Gibbons, 740 P.2d at 1313 ("'It is too late in the day to permit a guilty plea'" based on claims of defense counsel, since it is defendant who must be informed of the plea) (citation omitted)); State v.

Valencia, 776 P.2d 1332, 1335 (Utah Ct. App. 1989) (per curiam) (holding defendant's "understanding of the elements of the charge[] and the relationship of the law and the facts may not be presumed from a silent or incomplete examination" (citations omitted)).

In particular, a reviewing court will not "assume that defense attorneys," at some point prior to the change of plea hearing, "ma[d]e sure that their clients fully underst[oo]d the contents of the affidavit." Gibbons, 740 P.2d at 1313; see Lovell, 2010 UT 48 at ¶16 ("[A]lthough a variety of sources may be used to show that the defendant was informed of his rights, those sources must be incorporated into the record" (citing Maguire, 830 P.2d at 217-18 & nn. 1-2; Smith, 777 P.2d at 466); Hoff, 814 P.2d at 1122; United States v. Blackwell, 199 F.3d 623, 626 (2d Cir. 1999) ("an attorney's representation that he explained a charge to the defendant is not enough to demonstrate that the defendant underst[ood] the nature of that charge"); United States v. Smith, 60 F.3d 595, 598 (9th Cir. 1998) ("Even if we assume (without deciding) that the judge may delegate to defense counsel the responsibility to explain the charge, it is necessary that counsel inform the defendant in open court, so that in reviewing the record we may know what was said to the defendant.").

Nor will a reviewing court assume that a defendant was informed of the elements of the offense and the factual basis for the plea simply because the plea affidavit listed the Code number of the applicable statute. See Lovell, 2010 UT 48 at ¶45 ("Although strict compliance can be demonstrated using any information properly incorporated into the record of the current proceeding, a trial judge cannot demonstrate strict compliance by relying on a defendant's past experience with the criminal justice system or unsupported assumptions about the defendant's conceptual understanding."); Corwell, 2005 UT 28 at ¶17

(court may choose means different than the "particular phrases contained in rule 11(e)" to inform a defendant of his rights, but modification must serve to "give[] the defendant a more concrete and meaningful understanding of his rights"). Because the trial court bears the burden of strict compliance, affidavits and other documents relied on during a plea colloquy "should be only the starting point." Gibbons, 740 P.2d at 1313. The trial judge should still "review the statements in the affidavit with the defendant, question the defendant concerning his understanding of it, and fulfill the other requirements imposed by [rule 11] on the record before accepting the guilty plea." Id. at 1314. It should also clarify "'[a]ny omissions or ambiguities in the affidavit.'" Maguire, 830 P.2d at 217 (citation omitted).

In this case, the plea affidavit lacked "both a statement of the elements of the offenses and a synopsis of the defendant's acts that establish the elements of the crimes charged." Gibbons, 740 P.2d at 1313. Thus, the State does not just ask the Court to "assume" that defense counsel "ma[d]e sure that [Moa] fully underst[oo]d the contents of the affidavit." Id. It asks the Court to assume that defense counsel made sure that Moa fully understood an element and a factual basis that were never mentioned in the plea affidavit. Such an assumption is unjustified because "'[a]ny omissions or ambiguities in the affidavit must be clarified during the plea hearing.'" Maguire, 830 P.2d at 217 (citation omitted).

To support its claim, the State relies on Henderson v. Morgan, 426 U.S. 637 (1976), and Bradshaw v. Stumpf, 545 U.S. 175 (2005). See Rspt. Br. at 28-29. The presumptions suggested in those cases, however, are inapplicable here because those are habeas corpus cases. See Salazar, 852 P.2d at 992 (appellate court, when reviewing a collateral attack

rather than a direct appeal, "may look at the surrounding facts and circumstances, including the information the petitioner received from his or her attorneys before entering the plea").

In Henderson, the Supreme Court says that "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Henderson, 426 U.S. at 647. Later, in Bradshaw, the Supreme Court implemented the presumption in a case where competent defense attorneys "represented on the record that they had explained to their client the elements of the" offense and defendant "himself then confirmed that this representation was true." Bradshaw, 545 U.S. at 183. In the context of a collateral attack, the Court determined that "the constitutional prerequisites of a valid plea [were] satisfied where the record accurately reflect[ed] that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." Id.[2]

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[2] The State also cites State v. Gamblin, 2000 UT 44, 1 P.3d 1108, and State v. Martinez, 2001 UT 12, 26 P.3d 203, as support for its claim. See Rspt. Br. at 29. Gamblin and Martinez are direct appeal cases, but they are immaterial because the "presumption" they address is not a presumption that defense counsel informed the defendant of the elements and factual basis for the plea. Nor is it even a "presumption that the plea was knowing and voluntary" if the trial court simply "engage[d] in a rule 11 colloquy." Rspt. Br. at 29. Rather, it is presumption that the plea was knowing and voluntary only if the record of the plea proceedings shows that the trial court fulfilled its duty of "[s]trict compliance with rule 11(e)." Gamblin, 2000 UT 44 at ¶11 (citation omitted). Thus, the presumption applied in Martinez because the record of the plea proceedings showed that "the district court strictly complied with rule 11(e)," and, in particular, that the defendant, who admitted the elements and factual basis "in open court and in his affidavit," "possessed an understanding of the elements of murder in relation to the facts." Martinez, 2001 UT 12 at ¶¶23-25. Likewise, the presumption applied in Gamblin because the defendant conceded on appeal that the "trial court strictly complied with Rule 11(e)." Gamblin, 2000 UT 44 at ¶¶11-12. Such a presumption, however, does not apply in this case because, as the State concedes, the record of the plea proceedings shows that the trial court did not strictly comply with rule 11(e). See Rspt. Br. at 7, 29.

Besides, such a presumption is unwarranted by the record in this case. As explained in the opening brief, the record shows that defense counsel did not readily recall which statute applied to the plea, provided an incomplete recitation of the elements and factual basis during the plea colloquy, and relied on the plea affidavit as a complete statement of the guilty plea even though the affidavit was incomplete, confusing, and difficult to read. See Pet. Br. at 20-27; R. 3971 (1-3; 75-81; 226:4-7); Moa, 2009 UT App 231 at ¶¶8-9. Where the missing element and factual basis were not disclosed anywhere in the plea affidavit, the information, or the plea colloquy, it would be inappropriate to presume, even in the context of a habeas corpus petition, that defense counsel explained the elements and factual basis for the plea to Moa. See R. 3971 (1-3; 75-82; 226:4-7).

In sum, "the purposes and goals of Rule 11 are undermined when the court resorts to 'assumptions,' instead of establishing a record based on defendant's responses to the court's questioning," and "there cannot be compliance with Rule 11 where the 'district judge does not personally inquire whether the defendant underst[ands] the nature of the charge.'" United States v. Wetterlin, 583 F.2d 346, 350 (7th Cir. 1978) (citation omitted), cert. denied, 439 U.S. 1127 (1979). Thus, this Court should not presume that Moa was informed of the elements of the offense and the factual basis for the plea where no such presumption is allowed on direct appeal and such a presumption would be contrary to the record evidence.

D. The State's Response Briefs Misconstrues the Breadth of Moa's Claim.

The State claims that the trial court's error in this case was not obvious because a "violation of rule 11" does "not obviously render [a] plea unconstitutional." Rspt. Br. at 14-15, 20-27. There is no need for the Court to address this argument because it misconstrues

the breadth of Moa's appellate argument. In this case, the trial court accepted Moa's plea without adequately informing him of the elements of the offense or the factual basis of the plea. Pet. Br. at 20-27. On appeal, Moa does not argue merely that the error violated a "'prophylactic provision[] of rule 11.'" Rspt. Br. at 22 (quoting Salazar, 852 P.2d at 992). Rather, he argues that the error was a constitutional error that rendered his plea unknowing and involuntary in violation of rule 11, Utah Code Ann. § 77-13-6, and the due process clauses of the United States and Utah Constitutions. See Pet. Br. at 14-27, 30-38.

Besides, the State's attempt to reduce rule 11(e) to a list of "'prophylactic provisions'" that are immaterial to the constitutional analysis on direct appeal is contrary to the plain language of rule 11 and existing case law. Rspt. Br. at 22 (quoting Salazar, 852 P.2d at 992). The plain language of rule 11 says that a trial court "may not accept [a] plea until the court has found" that "the plea is voluntarily made" and that the defendant has been informed of each of the rule 11(e) rights. Utah R. Crim. P. 11(e). As explained in the opening brief, rule 11(e) "governs the entry of guilty pleas," Corwell, 2005 UT 28 at ¶11, because it embodies the knowing and voluntary standard of the due process clauses and section 77-13-6, and it provides a framework for producing a record for review. See Pet. Br. at 16-17; cf. McCarthy v. United States, 394 U.S. 459, 463, 465-67, 471-72 (1969) (holding that a violation of federal rule 11 requires reversal because rule 11 "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary" and, if followed, will "produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination"); Halliday v. United

States, 394 U.S. 831, 832 (1969) (noting that "rule 11's procedural safeguards . . . are designed to facilitate the determination of the voluntariness of [a] plea").

The "[s]ettled precedent" relied on by the State to support its claim that rule 11 compliance is divorced from constitutional analysis on direct appeal is Salazar. Rspt. Br. at 14-15; see Rspt. Br. at 20-27. Salazar, however, is irrelevant because its holding is limited to writs of habeas corpus. See Lovell, 2010 UT 48 at ¶79; Bluemel, 2007 UT 90 at ¶¶18-19; Salazar, 852 P.2d at 992; supra at Part II.A.; cf. Timmreck, 441 U.S. at 784.

Moreover, the State's notation that section 77-13-6 was amended in 2003 to replace the "good cause" standard with the constitutional "knowing and voluntary" standard has no bearing on this appeal or on rule 11's usefulness in the constitutional analysis. See Rspt. Br. at 23-26 & n.8. Rule 11 embodies the constitutional standard, not the good cause standard: It was "designed to protect an individual's rights when entering a guilty plea 'by ensuring that the defendant receives full notice of the charges, the elements, how the defendant's conduct amounts to a crime, the consequences of the plea, etc.'" Bluemel, 2007 UT 90 at ¶17 (citation omitted); see State v. Beckstead, 2006 UT 42, ¶10, 140 P.3d 1288 ("Rule 11 . . . requires that guilty pleas be accepted only from defendants who understand the rights they surrender by pleading guilty and who voluntarily waive those known rights."); Corwell, 2005 UT 28 at ¶11 (same); Pet. Br. at 16-17 (additional citations).

In sum, Moa does not contend that every violation of rule 11 necessarily amounts to a constitutional violation. See Pet. Br. at 30-38. Rather, he argues that the trial court's error in this case—accepting his guilty plea without informing him of the elements of the offense or the factual basis for the plea—was a constitutional error that warrants reversal because it

violated rule 11(e), section 77-13-6, and due process. See Pet. Br. at 14-27. Moreover, he argues (and the court of appeals agrees) that the error was obvious because the law at the time of the plea proceedings required the trial court to ensure that he understood the elements of the offense and the factual basis for the plea before he entered the guilty plea. Thus, the State's claim that a rule 11 violation does not necessarily constitute a constitutional violation is immaterial to this appeal.

III. THIS COURT SHOULD REVERSE CASE NO. 3971 FOR PLAIN ERROR BECAUSE THE TRIAL COURT'S ACCEPTANCE OF THE GUILTY PLEA WAS PREJUDICIAL

Moa responds to the State's claim that the Court's holding in Dean governs the outcome of this case. Moa also responds to the State's claim that information in the Presentence Report (PSI) undermines his assertion that he would not have pleaded guilty but for the trial court's error. Moa does not respond to the State's other arguments because those are adequately addressed in the opening brief. See Pet. Br. at 30-43.

First, the outcome in Dean does not govern this case. The State claims that this Court, in Dean, already rejected Moa's claim that prejudice exists when a defendant asserts that he would not have entered the plea but for the error and shows that the error affected his substantial rights. See Rspt. Br. at 33-35. Dean's statement of the law, however, is consistent with Moa's argument. In Dean, the Court did not say that the only way a defendant can establish prejudice is to "show that, 'but for the alleged error, [he] would not have pled guilty.'" Rspt. Br. at 34 (quoting Dean, 2004 UT 63 at ¶22)). To the contrary, the Court held that an error is prejudicial if it "'affected the outcome of the plea process.'" Dean, 2004 UT 63 at ¶22 (citation omitted). Therefore, "establishing harm in the present

context generally requires the defendant's *assertion* that 'but for' the alleged error, he or she would not have pled guilty." Id. (citations omitted) (emphasis added).

Moreover, the outcome of Dean is distinguishable from this case. In Dean, the defendant failed to establish prejudice because he "never asserted that the trial court's alleged error prejudiced him in any way." Dean, 2004 UT 63 at ¶23. Rather, he asked the Court to presume harm because the right to a speedy, public trial, which he alleged was missing from the plea colloquy, was "a substantial constitutional right." Id. Whereas, Moa met the prejudice requirement because he asserted that he would not have pleaded guilty but for the error, and he demonstrated how omitting an element and its factual basis from the plea affidavit and colloquy actually affected his substantial rights. See Pet. Br. at 32-39.

Second, the State argues that Moa's criminal history "directly contra[dict]ed" his assertion that he would not have pleaded guilty but for the erroneous omission of an element and its factual basis from the plea colloquy. Rspt. Br. at 15, 37-38, 40-41. It claims that Moa has a "proclivity toward violence and aggressive, intimidating behavior" and, therefore, must have acted with "intimidation, aggression, and violence" in this case. Rspt. Br. at 37-38. To support its argument, the State relies on the criminal history provided in the PSI. See Rspt. Br. at 3-4, 37-38, 40-41.

As with its obviousness argument, the State improperly invokes the habeas corpus standard of review. See supra at Part II.A. It attempts to bridge the gap in the factual basis for the plea with an assumption that Moa has a bad "character" and, therefore, must have acted "in conformity" with that character in this case. Utah R. Evid. 404(b); see State v. Shumway, 2002 UT 124, ¶15, 63 P.3d 94 (holding "fabric of evidence against the defendant

must cover the gap between the presumption of innocence and the proof of guilt" and must not require "a speculative leap across a remaining gap in order to sustain a verdict" (citation omitted)). Worse, it draws the assumption from the PSI, which was not and could not have been properly incorporated into the record at the time of the plea proceedings since it was not created until after the change of plea hearing. See, e.g., Lovell, 2010 UT 48 at ¶79; Corwell, 2005 UT 28 at ¶¶11-12; Hoff, 814 P.2d at 1122; Gibbons, 740 P.2d at 1312.

Furthermore, some of the State's characterization of Moa is inaccurate or incomplete. For example, the State suggests the Moa was "booked into jail" on the felony aggravated assault charges and, upon release, "fled the state." Rspt. Br. at 4 (citing R. 3971 (4; 112:4)). Actually, there is nothing in the record to show either that Moa knew about the aggravated assault charges before he left Utah or that he fled Utah in order to avoid facing those charges. Moa was arrested on April 8, 2003, and released the same day. R. 3971 (112:4). But that arrest was for misdemeanor charges of theft and intoxication. R. 3971 (112:6). The warrant for Moa's arrest on the aggravated assault charges was not issued until June 13, 2003, and was not executed until December 28, 2006. R. 3971 (4; Salt Lake County Sheriff's Office Jail Booking Record dated Dec. 28, 2006; District Court Docket at page 2).[3]

The State also claims that Moa had "a pronounced proclivity toward violence and aggressive, intimidating behavior" because his criminal history "included multiple charges for assault, as well as charges for obstruction of justice, robbery, theft, and interfering with arrest." Rspt. Br. at 37. In reality, the "multiple charges for assault" are one misdemeanor

[3] The Salt Lake County Sheriff's Office Jail Booking Record from December 28, 2006, and the District Court Docket are included in the record. Both documents are unnumbered and stored on the left-hand side of the red record folder for case no. 3971.

charge of attempted assault by a prisoner; two misdemeanor charges of simple assault, one of which was dismissed; and one felony charge of assault by a prisoner, which was also dismissed. R. 3971 (112:6). Further, the obstruction of justice charge, one of the theft charges, and the three interfering with police charges were all misdemeanors. Of those, all were dismissed except for two of the interfering with police charges, and those two charges dated back to 2001. R. 3971 (112:6). Finally, Moa had two felony robbery convictions out of Washington and a felony theft conviction in Utah. R. 3971 (112:6). But these convictions also dated back to 1998 and 2001 respectively. R. 3971 (112:6).

Similarly, the State claims that Moa "continued his pattern of violent crime" after "fleeing the State" because he was charged with two counts of assault in Washington, and counts of obstruction of justice, vandalism, and possession of marijuana with intent to distribute in California. Rspt. Br. at 4, 37. Of this list of offenses, only the assault charges suggest violence. Further, of the two assault charges, only one is reliable. The PSI shows that Washington charged Moa with one count of assault in November 2003. R. 3971 (112:6). The disposition of the other alleged assault is "unknown," and a notation suggests that charge may relate back to the November 2003 charge. R. 3971 (112:6). Additionally, of the other charges listed by the State, only one (obstruction of justice) resulted in a known conviction. R. 3971 (112:6). The vandalism charge was dismissed, and the disposition of the alleged possession charge is "[u]nknown." R. 3971 (112:6-7).

Third, the State claims that the error was harmless because there was a factual basis to support the missing element. Rspt. Br. at 15, 32-33 n.10, 37-38, 40-41. For the most

part, the State supports this argument with citations to the summary of the offense provided in the PSI. See Rspt. Br. at 3-4, 37-38, 40-41.

Again, this argument improperly invokes the habeas corpus standard of review. See supra at Part II.A. The PSI's summary of the offense does not reflect evidence that was submitted under oath, subjected to cross-examination, admitted by the defendant, or proved beyond a reasonable doubt. See State v. Howell, 707 P.2d 115, 118 (Utah 1985) (noting that information used at sentencing need only be "reasonably reliable and relevant"). In fact, in this case, it does not even reflect evidence that the State was confident would be presented at trial since the prosecutor was having difficulty getting the witnesses to appear. See R. 3971 (98-100; 234:5, 7-8, 15); Pet. Br. at 25. Plus, it was not and could not have been properly incorporated into the record at the time of the plea proceedings because the PSI was not created until after the change of plea hearing. See, e.g., Lovell, 2010 UT 48 at ¶79; Corwell, 2005 UT 28 at ¶¶11-12; Hoff, 814 P.2d at 1122; Gibbons, 740 P.2d at 1312.

Thus, as further explained in the opening brief, this Court should reverse because the court of appeals erred by holding that Moa was not harmed when the trial court violated due process by accepting his guilty plea without informing him about a necessary element of the offense or eliciting a factual basis to satisfy that element. See Pet. Br. at 30-43.

CONCLUSION

Moa asks this Court to reverse State v. Moa, 2009 UT App 231.

SUBMITTED this 23 day of December, 2010.

Lori Seppi

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CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be delivered an original and nine copies of the foregoing to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 23 day of December, 2010.

Lori Seppi
LORI J. SEPPI

DELIVERED this _____ day of December, 2010.

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